United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original of affidavit of Mooney

75-1173

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P/S.

To be argued by
GAVIN W. SCOTTI

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1173

UNITED STATES OF AMERICA,

Appellee,

—against—

FRANK LICURSI, JR.,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
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TABLE OF CONTENTS

TABLE OF CASES

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Preliminary Statement

The appellant Frank Licursi, Jr. was tried on a single count indictment charging that he, along with David Corr and Dana Dynes, aided and abetted one Eugene Caufield in the distribution of 89 grams of cocaine.* Appellant was found guilty after a jury trial before the Honorable Mark A. Costantino, in the United States District Court for the Eastern District of New York and was sentenced on April 18, 1975, to three years imprisonment, execution of sentence suspended, three years probation, and a $500 fine.

On appeal appellant seeks a reversal of his conviction and judgment of acquittal claiming that the trial court erred in denying his motions for judgment of acquittal at the close of the government's case, at the end of the entire

* Eugene Caufield pleaded guilty to this charge and David Corr and Dana Dynes pleaded guilty to related charges.

case, and after the jury's verdict. Appellant alternatively seeks a new trial predicated upon the assertion that the trial court created reversible error by denying his request for a charge on entrapment.

Statement of Facts

Early in the evening of May 5, 1974, appellant, Frank Licursi, introduced Eugene Caufield to Joseph Brzostowski, an undercover agent of the Drug Enforcement Administration (D.E.A.), for the sole purpose of promoting the sale of cocaine (47-48, 134-5, 172-73, 176-77).* This meeting took place at Licursi's apartment in Fairlawn, New Jersey (48, 122, 134-36).

Sometime prior to May 5, 1974, a D.E.A. informant by the name of John Di Janni ** had called Licursi inquiring if Licursi could supply cocaine for a friend of Di Janni (126-29). The next evening, while attending school to become an electrician, Licursi spoke to Gene Caufield, a classmate, whom Licursi had known for three years and Caufield advised that he could get cocaine.*** Appellant told Caufield that Di Janni had a friend who was interested in buying cocaine and Caufield told Licursi to get them together (129-32). The following day, May 3, 1974, Di Janni called Licursi and told him that "Joe" (Agent Brzostowski) wanted to buy a quarter-pound of cocaine and asked if Licursi could still get cocaine. Licursi informed Di Janni of his conversation with Caufield the night before and a meeting was arranged at Licursi's apartment for Sun-

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* Numbers in parenthesis refer to transcript pages.

** At the time Di Janni was under indictment in the District of New Jersey for conspiracy to sell cocaine (46-47, 71-82).

*** According to Licursi, he and Caufield were having a general conversation when Caufield mentioned "out of the clear blue" that he could get cocaine (130-31).

day, May 5, 1974, at which time Di Janni would introduce "Joe" to appellant who would, in turn, introduce them to Caufield * (46-48, 71, 132-34, 165-71).

These negotiations between Di Janni and Licursi did not mark the beginning of their association which began about a year before (125-26). Licursi had met Di Janni through a girl friend, Jennifer Lisa; he had socialized with Di Janni on prior occasions, had a few mutual friends with Di Janni, and on one occasion Licursi, Di Janni and Jennifer Lisa had "snorted" cocaine together (158-60, 190). Appellant had also used marijuana on several occasions as did some of his friends (181).**

As planned, Di Janni introduced Agent Brzostowski to Licursi on May 5th (135). Upon entering Licursi's apartment, Brzostowski expressed concern at the number of people present to which Licursi replied "Don't worry about it. Everything's cool. Everyone knows what's going on here." Licursi then introduced Brzostowski to Gene Caufield, whom he described as the "guy with the cocaine connection", to Phillis Caufield and to Jennifer Lisa. Gene Caufield and Brzostowski agreed they were ready "to do business" (49-50). While Caufield made the customary phone call to consummate the deal, Brzostowski questioned Licursi about the quality of the cocaine he was to get for his $4,000. Licursi assured Brzostowski saying "Don't worry about it. The cocaine Gene gets you will be of good quality" (50). Caufield ended his telephone conversation and, in the presence of Licursi, told Brzostowski that they would have to go to Brooklyn to get the cocaine (51). After

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* Di Janni did not know Caufield who he first met through Licursi on May 5, 1974 (171-72).

** On direct examination Licursi cliamed that he initially told Di Janni that he didn't deal in cocaine or know anyone who had cocaine. Licursi further asserted on direct examination that he had never discussed cocaine with Di Janni before Di Janni's telephone call to him in early May of 1974 (126-28, 159).

some discussion concerning Brzostowski's impression that the cocaine would be in New Jersey and Caufield's insistence on going to Brooklyn, everyone departed. Di Janni left the group to attend to personal business, Brzostowski used his undercover government car, Gene Caufield mounted his motorcycle, and the appellant, Licursi, drove his Volkswagen with Caufield's wife Phillis and Jennifer Lisa and the caravan proceeded to Brooklyn to get the cocaine (51-52).* Licursi was leading, followed by Brzostowski, and then Caufield on the motorcycle (52-53, 139-42, 176-77).

While enroute to Brooklyn and still in New Jersey, Brzostowski stopped the caravan twice and voiced his dissatisfaction to Caufield and Licursi about going to a location not known to him with a large amount of money (53).** During the second discussion outside the Plaza Diner in Fort Lee, New Jersey, Caufield stated that he thought he could return to New Jersey with the cocaine by nine o'clock that evening. He agreed to call Brzostowski at the diner if there were a change of plans (53-56, 92-94, 142-44).

Appellant, Caufield and the girls left the diner. At approximately 9:00 p.m. Caufield called Brzostowski at the Plaza Diner and stated the man with the cocaine would not come to New Jersey. Brzostowski stated he would not go to Brooklyn but agreed to call Caufield if he changed his mind. About ten minutes later, Brzostowski called Caufield

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* On direct examination Licursi first gave the impression that he didn't know the reason for going to Brooklyn. He then stated that the cocaine was in Brooklyn, but denied any knowledge of "any coke deal" that was to take place in Brooklyn. On cross-examination, Licursi testified that he knew that Caufield and Brzostowski were going to Brooklyn to get cocaine, but asserted that he was merely driving Caufield's wife to Brooklyn (139-41, 176-77).

** Although present, Licursi did not actively participate in these two conversations (55-56).

and stated he was not going to Brooklyn. Caufield verbalized his displeasure at Brzostowski, slammed the phone down on a table and Licursi, who was in Brooklyn with Caufield, picked up the phone (56-57). Licursi explained to Brzostowski that the people in Brooklyn were "paranoid" and "nervous" about the deal (cocaine transaction) and did not want to come to New Jersey (152-53, 178). Licursi offered to meet Brzostowski and take him to the transaction site and Brzostowski counter-offered to transact the sale in Manhattan but an impasse was reached. Brzostowski gave Licursi a phone number to give to Caufield in case Caufield changed his mind (57). At eleven-thirty that night Caufield did call Brzostowski and they agreed to transact the sale the next day in Brooklyn (58).

For the purposes of this brief, suffice it to say that on May 6, 1974, Agent Brzostowski and another undercover agent purchased the cocaine from Gene Caufield in Brooklyn. This transaction also involved David Corr and Dana Dynes (58-66). The appellant, Licursi, was not present although he understood that Caufield and Brzostowski were to conclude the deal and in fact, was told by Caufield on May 7, 1974, that the cocaine transaction was completed (156, 186-87). Three or four days later, Licursi advised Di Janni that Caufield and Brzostowski had completed the deal (188).

ARGUMENT

POINT I

The trial court properly denied the defendant's motions for judgment of acquittal.

Appellant first asserts that the facts failed to establish that he aided and abetted the sale of cocaine and ascribes as error the trial judge's denial of his several motions for judgment of acquittal. These motions were made at the close of the Government's case, after the defense case, and

subsequent to the jury's verdict. This contention should be rejected. Simply put, appellant's recital of the events minimizes his participation in the cocaine transaction to the extent of grossly distorting the facts.

At the outset, appellant's argument must be narrowed by disregarding his claim of error at the close of the Government's case. Once a motion for a judgment of acquittal at the end of the prosecution case is denied and the defendant then affirmatively produces evidence in his defense, his prior motion is deemed waived. *United States* v. *Goldstein*, 168 F.2d 666, 668-71 (2d Cir. 1948). Accordingly, the validity of appellant's contention must be tested against the evidence as reflected in the entire record and in a light most favorable to the Government. *United States* v. *Rosner*, 485 F.2d 1213 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974).

Appellant's claim essentially amounts to an attack on the sufficiency of the evidence. The test for reviewing a trial court's determination of a motion for a judgment of acquittal under Rule 29, Federal Rules of Criminal Procedure is whether the evidence was sufficient for a reasonable mind to fairly conclude guilt beyond a reasonable doubt. *United States* v. *De Garces*, — F.2d — (2d Cir. Slip. Op. 4009, 4016; decided June 13, 1975); *United States* v. *Taylor*, 464 F.2d 240, 243 (2d Cir. 1972).

It is respectfully submitted that under this standard Judge Costantino properly denied appellant's motions for a judgment of acquittal. The evidence overwhelmingly demonstrated appellant's actions which brought about the cocaine sale, his association with the persons involved, and his endeavors to make the transaction succeed. Notwithstanding the defendant's denials of certain aspects of the events involved, the jury had before it the following facts: (1) appellant took affirmative action in bringing Gene Caufield, the supplier of cocaine, into the transaction;

neither the D.E.A. Agent Brzostowski nor the informant, Di Janni, had any prior knowledge of Caufield; (2) appellant used his apartment as the meeting place to bring the buyer (Brzostowski) and seller (Caufield) together; (3) appellant twice mollified the buyer's concern: First, regarding the number of people present, "Everyone knows what's going on here"; and second, about the quality of the cocaine: "The cocaine Gene will get you will be of good quality"; (4) appellant went to Brooklyn with Caufield, knowing that the cocaine was in Brooklyn; (5) appellant, while in Brooklyn, spoke to Brzostowski on the telephone explaining that the sellers were "paranoid" and "nervous" about the cocaine transaction and offered to meet Brzostowski and bring him to the transaction site; (6) Caufield advised appellant that the sale had been consummated the very next day after the fact; and (7) a few days after the sale, appellant advised the informant, Di Janni, that the transaction had been successfully completed.

The evidence was clearly sufficient for the jury to find beyond a reasonable doubt that appellant had aided and abetted or actively associated himself with this venture at virtually every step of the transaction.

Certainly appellant suffered expense and inconvenience in his participation in this venture. It was something he wished to bring about and which he sought by his purposive action to make succeed. *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). The fact that appellant was not physically present on May, 1975, when the cocaine and money changed hands obviously did not persuade the jury otherwise.* Like-

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* Appellant's counsel stressed this point in summation and in argument before the trial court. However, the jury could have reasonably concluded that the sale of cocaine would have taken place in appellant's presence had Agent Brzostowski and Caufield met in Brooklyn on the evening of May 5th, as in fact they did on May 6th.

wise, appellant's reliance on the assertion that he did not reap a financial reward for his efforts (Br. 4) carries no dispositive weight in this Circuit. *United States* v. *Manna*, 353 F.2d 191, 192-93 (2d Cir. 1965), *cert. denied*, 384 U.S. 975 (1966); *United States* v. *Blazer*, 309 F.2d 92, 93 (2d Cir. 1962). Moreover, the jury had ample evidence before it of Licursi's personal interest in making the venture succeed. Licursi assured Brzostowski that everyone in his apartment knew what was going on; that the cocaine his friend Gene would get would be of good quality and later in the evening of May 5th, offered to shepherd Brzostowski to the transaction site. In short, appellant made every effort on behalf of "his friend" Caufield to insure that cocaine would be sold to Brzostowski.

The cases cited by appellant are clearly distinguishable on their facts and as such have no application to the instant case. In *United States* v. *Peoni, supra,* the defendant sold counterfeit money to one Regno who, in turn, sold it to Dorsey. Peoni was charged and convicted with being an accessory to Dorsey's possession of this money. On appeal, this Court reversed the conviction holding that Peoni's connection with the money ended when he sold it to Regno. Clearly, Licursi's association with the crime charged herein cannot be equated with Peoni's passing connection with Dorsey. Licursi was acting directly on behalf of Caufield and Brzostowski to promote the very sale of cocaine for which he had brought them together.

In *United States* v. *Moses*, 220 F.2d 166 (3d Cir. 1955), defendant's conviction for aiding and abetting the illegal sale of heroin was reversed because the evidence revealed the defendant to be merely an addicted customer of the drug dealer, not a collaborator in the heroin sale. The buyers came to the defendant's apartment uninvited and at a time that fortuitously coincided with the arrival of the seller. Her conduct was confined to introducing the buyers to the seller and vouching for them. Moreover, the

defendant had been indicted under a drug control statute (no longer in force) that proscribed the buying and selling of narcotics as separate and distinct offenses. Since Moses had been charged with the crime of selling alone, the fact that the proof went exclusively to her actions at the behest of the buyers militated against her conviction of complicity in the selling. 220 F.2d at 168.

In *Morei* v. *United States*, 127 F.2d 827 (6th Cir. 1942), the court reversed the conviction of a co-defendant, Dr. Platt, on charges of aiding and abetting a heroin transaction. The only evidence of Dr. Platt's involvement consisted of the following: 1) the physician was approached by an informer to supply heroin in order to "soup" race horses; 2) lacking a store of heroin, the physician gave the informer the name and address of defendant Morei, advising the informer "to see Morei and tell him that the doctor had sent him and that 'he will take care of you'", and 3) the informer gave Dr. Platt certain inside information on racehorse fixing. 127 F.2d at 29-30.

Appellant's claim that Judge Costantino erred in denying his motions for a judgment of acquittal based on the above facts is simply not warranted and should be rejected.

POINT II

The trial court properly denied defendant's request for a jury charge on entrapment.

Appellant's alternative contention that the trial court should have charged the jury on the law of entrapment is completely unfounded. Appellant's claim is devoid of any supportive evidence in the trial record which would justify designating as error Judge Costantino's denial of his request to charge the jury on entrapment. It is clear that the presence of such evidence is an essential prerequisite before such a charge is given and that absent such evidence

a trial judge is not required to charge entrapment merely because he is requested to do so by counsel. *United States* v. *Alford*, 373 F.2d 508, 509 (2d Cir.), *cert. denied*, 387 U.S. 937 (1967).

In an apparent disregard of the law of this Circuit, appellant nevertheless claims that he was entitled to an entrapment charge. This assertion is presumably founded on the fact that he had no prior narcotics convictions and that his conduct was insufficient to bring him within the bounds of criminal liability as an aider and abettor. However, the sufficiency of the evidence to prove the substantive crime charged and the raising of issues to negate that sufficiency cannot be equated with "evidence that would raise the issue of the defendant's lack of willingness and readiness and thus tend to show the act to have been 'the product of the creative activity' of Government officials. . . . Such evidence was altogether lacking here." *United States* v. *Alford*, *supra*, 373 F.2d at 509-510. Appellant's counsel did attempt to show that the totality of Licursi's involvement was merely to make an innocent introduction of two people who would then negotiate their own terms for the sale of cocaine. However, appellant testified that he had knowledge of the purpose of the introduction and made clear his comprehensive understanding of the narcotics transaction which was anticipated and his participation in the events surrounding the transaction itself.

Appellant's counsel neither produced nor attempted to elicit any evidence during his cross-examination of Brzostowski or the direct examination of Licursi upon which to factually base a defense of entrapment. Such a failure, it is respectfully submitted, vitiates his claim on appeal in light of the clear analysis of the law of entrapment as set forth by this Circuit in *United States* v. *Sherman*, 200 F.2d 880, 882 (2d Cir. 1952). Under *Sherman*, the defendant had the burden of coming forth with evidence to show that he was induced to commit the crime charged. If he had done so,

the government would have then had the burden to show the defendant's predisposition to commit the crime. 200 F.2d at 882-883. Further, if the government's evidence of predisposition were uncontroverted, the defendant would not be entitled to a charge on entrapment. *United States* v. *Greenberg*, 444 F.2d 369, 372 (2d Cir. 1971).

At no time did appellant intimate or claim that he was induced in any way to take the affirmative, purposive actions that he testified to. To the contrary, appellant's testimony established the fact that once solicited, he voluntarily and affirmatively acted to introduce a source of cocaine (Caufield) heretofore unknown, to Di Janni. Further, appellant had no hesitation whatever in making this introduction of the seller to the buyer in his apartment in the presence of his girl friend, Jennifer Lisa, and the seller's wife. Appellant's state of mind in this regard and predisposition to commit the crime charged are best expressed in his own words. "Well, this is husband and wife and girl friend and boy friend. Everybody knows what's going on" (173). Where the record is devoid of evidence sufficient to warrant a jury finding that a defendant was induced to initiate the commission of a crime, that defendant is not entitled to an entrapment charge because the necessary first element of entrapment, namely, inducement, is not present. *United States* v. *Barash*, 412 F.2d 26, 30 (2d Cir. 1969), *cert. denied*, 396 U.S. 832.

Certainly, nothing in the testimony of Licursi or Agent Brzostowski can reasonably be said to show anything more than a solicitation of appellant by the informant.* As a matter of law, the act of solicitation cannot be equated with

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* It should be noted that appellant's counsel opted not to produce the very witness (the informant, Di Janni) who he had indicated would prove the defense of entrapment (37-38, 109-115, 120).

conduct that would persuade an otherwise innocent person to commit a crime. Accordingly, no issue of entrapment is raised in the testimony. *United States* v. *Berry*, 362 F.2d 756, 758 (2d Cir. 1966). See also *Lopez* v. *United States*, 373 U.S. 427, 435 (1963); *Kibby* v. *United States*, 372 F.2d 598, 602 (8th Cir. 1967); *United States* v. *De Vore*, 423 F.2d 1069, 1071 (4th Cir. 1970).

Finally, appellant's own testimony clearly set forth a predisposition to commit the offense charged. In the face of this uncontroverted evidence, the trial court's decision not to charge the jury on entrapment was correct. *United States* v. *Greenberg*, 444 F.2d 369 (2d Cir. 1971). For, contrary to defense counsel's belief, the fact that Agent Brzostowski had not met appellant prior to May 5, 1974, or that appellant had no prior record of narcotics convictions or known drug dealings did not create an issue of inducement or negate the clear evidence of appellant's predisposition (see, Br. 7, 193). *United States* v. *Bishop*, 367 F.2d 806, 810 (2d Cir. 1966).

In light of the facts of this case and the applicable law, it is respectfully submitted that appellant's instant claim is frivolous at best.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: July 21, 1975

Respectfully submitted,

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* The United States Attorney's Office wishes to acknowledge the assistance of Salvatore A. Carpino, a third year law student at Western New England College Law School, in the preparation of this brief.

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AFFIDAVIT OF MAILING

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EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

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That on the 23rd day of July 19 75 he served ~~a~~ two copies copy of the within

Brief for the Appellee

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Sworn to before me this
23rd day of July 19 75

Irene B. Cohen (Bevilacqua)

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No. 24-0683965
Qualified in Kings County
Commission Expires March 30, 1977